No. 2674

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY (a corporation),
Plaintiff in Error,

vs.

SAMSON IRON WORKS (a corporation),
Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

DAVID L. LEVY,
WALTER SHELTON,
CAMPBELL, WEAVER, SHELTON & LEVY,
Attorneys for Plaintiff in Error.

Filed this.....day of March, 1916

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2674

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY (a corporation),
Plaintiff in Error,

vs.

SAMSON IRON WORKS (a corporation),
Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

---

1. Statement of the Case.

This case comes to this court upon a writ of error after verdict and judgment in the District Court in favor of the defendant in an action by Westinghouse Electric & Manufacturing Company for breach of a contract for the sale and installation of three generators and necessary equipment.

The Samson Iron Works had undertaken the installation in the Spalding building (then under construction) of the electrical power plant which was to consist of three units; each unit was to be composed of a generator and a gas engine.

The Iron Works thereafter entered into the agreement in suit which is in the form of a proposal made by the Westinghouse Company and accepted by the defendant at San Francisco on May 26, 1910. The contract was then taken to Portland by Wernicke, the Westinghouse representative, and from there mailed to East Pittsburgh (*157). The letter ratifying the authority of Mr. Head, the salesmanager of the Iron Works, to execute the contract was not received by the plaintiff until June 6, 1910.

The contract provided for the delivery and erection of the generators on foundations in the basement of the Spalding Building at Portland, Oregon. The first generator was to be shipped immediately from San Francisco, and a temporary switchboard was to be furnished with it, pending receipt of the complete switchboard from the east. The remaining two generators were to be built and sent from the Westinghouse factory at East Pittsburgh.

Concerning the time of performance as to the first generator, the contract read:

> This generator with its gas engine will be considered as the first of three units which will be installed in the Spalding Building. This first unit has to be in operation by July 1st, 1910, and it is agreed and understood that payment in the amount of $1500.00 will be made on the total contract price, immediately upon installation and acceptance, which payment will not be made later than July 15, 1910 (*2-3).

---

* The references are to the pages of the transcript.

As to the other generators, it was provided:

> Delivery of the second 75 K.W. generator and the 100 K.W. generator will be made from our factory in approximately 90 days from date of receipt of order, with full and complete information (*3).

The first generator reached the Spalding building at Portland approximately June 15, 1910 (*157). The erecting engineer of the Westinghouse Company was N. P. Wilson, whose office was in Seattle. He was first called to the job at Portland in July (*157, 125), devoting from the 9th to the 17th of that month to the installation of the temporary switchboard and to preparatory work with the cables which were part of the equipment.

In this period of the installation the shaft, which was furnished by the Iron Works for the first unit, was being manufactured at Portland under the supervision of Mr. Mitchell, the defendant's representative (*125-6). The shaft is the element connecting the engine with the generator. In erecting a unit of this kind the engine is set up, the armature, or rotating element of the generator, is next rigidly mounted on the shaft, and then the frame, or stationary part of the generator, which is vertically split or divided, is fitted around the armature. It then remains but to secure the generator to the foundations and the unit is complete (*127; 151-3). Thus by reason of the absence of the shaft (a matter for which the Iron Works was responsible), it was impossible at this time to erect the generator.

[For the aid of the court we print on the opposite page a photographic reproduction of a vertically-split, engine-type generator, connected to a gas engine and mounted upon the latter's base.]

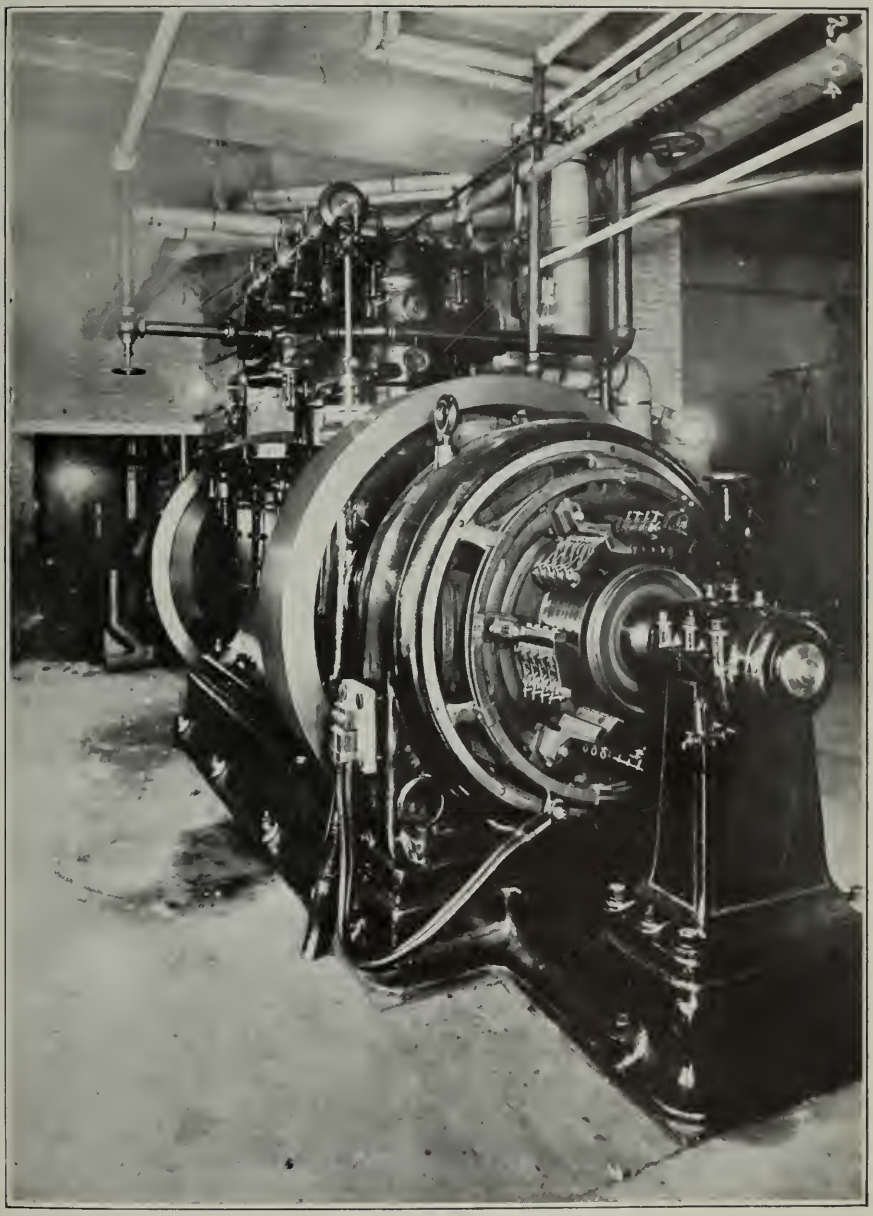
Moreover, the basement was not yet complete; the concrete floors were not laid. The first gas engine was in the basement but not on its foundation (*125-6). Here, then, was another reason why the generator could not be erected; in this respect the owner of the building was in default. Under well-settled principles each of these factors excused prompt installation by the Westinghouse Company; performance was in fact physically impossible. Conceding, then, that the clause in the contract:

> This generator with its gas engine will be considered as the first of three units which will be installed in the Spalding Building. This first unit has to be in operation by July 1st, 1910 * * * (*2)

means that the Westinghouse Company was to have the generator installed by that time, its failure to do so was not a breach on its part under the circumstances. The trial judge so instructed the jury (*181-2).

On July 17th, before leaving the job, Wilson inquired of Mitchell concerning the prospect of proceeding with the installation. Mitchell replied that he did not know, that he had no idea when the shaft would be ready (*126-7).

In the meantime Wernicke at Portland kept in touch with the job and again called Wilson from



Seattle on July 26 (*157; 127). The building foundations were in but Mitchell was still working with the gas engine, getting it ready for installation. Wilson, nevertheless, temporarily erected the generator on a heavy wooden sole-plate. But it was impossible to operate the generator because the Iron Works had not yet connected up the piping through which the gas was to be conducted to the engine (*128-9). There being no fuel, the engine could not be operated, and thus another delay was caused. In this also the Westinghouse Company was, of course, entirely clear of fault. Wilson remained on the job this time until the 1st of August. Before he left he asked Mitchell when the gas piping would be put in ready to run. Mitchell replied that he did not know (*128).

Meanwhile the first payment under the contract had fallen due. The parties had agreed that $1500 was to be paid upon installation of the first unit, which was to be complete by July 1, 1910; but, apparently contemplating just such a delay as occurred it was provided that this payment should be made not later than July 15, 1910 (*2, 3).

On August 3, 1910, the Westinghouse Company addressed a letter to the Iron Works inclosing an invoice in the amount of $1500, stating that this sum had fallen due under the contract and requesting payment thereof (*133). This was acknowledged by Mr. Head for the Iron Works (*133-5), who wrote that the invoice was receiving his attention. Then follows in the letter an obvious endeavor to avoid or

postpone this payment; first, on the ground that the oral understanding between the parties on the subject had been different from the written agreement, and second, upon the ground that the Westinghouse Company had not finished its work. We quote from the letter:

> Three or four days ago we received a letter from our installing engineer in which he said that his work was complete and that he could not do anything further because the electricians had not finished their end and this we presume to be your company. Yesterday we received another letter from him from which we understand that the work is now complete and that they propose to run the first plant for 24 hours *but can not use it any further for a month or two as the building will not be complete.*

The last clause italicized is material in the light of future developments. The net purport of the letter, however, is the effort of the Iron Works to avoid complying with the contract as to this payment, and to induce the Westinghouse Company to wait until the former should receive an installment under its general contract with the owner of the building. The suggestion that the Westinghouse Company was delaying the installation was apparently based upon alleged hearsay. The uncontradicted proof in the case completely refutes the assertion. In response, the Westinghouse Company wrote to the Iron Works on August 8, 1910, insisting upon adherence to the contract and again asking payment (*135-6).

In answer the Iron Works wrote on August 9, 1910, suggesting that in a transaction of the kind in-

volved there should be a "certain amount of give and take," and again attempting to evade the obligation to pay (*137-8).

The defendant followed this with another letter to the plaintiff dated August 12, 1910, stating that the defendant's engineer at Portland had informed them that the remaining generators would not reach Portland until sixty days thereafter, and asking for a full explanation (*175). That this was merely another effort to evade payment and not a complaint in good faith for non-performance is plain from the fact that it was addressed, not to Portland nor to those in charge of the installation for the plaintiff, but to San Francisco, and to Mr. Irwin, of the Treasury Department, whose only function in the matter had been to conduct the correspondence concerning the matured partial payment. Furthermore, the attitude expressed in this letter is utterly irreconcilable with the statement of the defendant eight days before that the first plant could not be used "any further for a month or two as the building will not be complete." Mr. Irwin answered August 15, 1910 (*176), stating that he had no advice on the subject and that he was presenting the matter to the Portland representative.

This letter was crossed by another of the same date from the Iron Works referring again to the second and third generators, and stating further:

> We have just received a letter from our engineer in Portland saying that the first generator is anything but a success at the present

> time and that your company put a wooden bedplate underneath it, causing it to rock when in motion. We have wired our representatives, the Industrial Engineering Company, of Portland, to send us a complete report of this plant and would request that you wire to your Mr. Wernicke and have him make you a definite statement about how your men are performing the work (*176-7).

This also was addressed to Mr. Irwin, who replied that the difficulty was not due to any fault in the plaintiff's apparatus but rather in the coupling and shaft furnished by the Iron Works; further that this had been conclusively proved to the latter's representative. Demand was again made for the payment which had fallen due.

Let us now return to the job at Portland to ascertain what had developed during this interchange of correspondence.

Wilson was called again to Portland on August 15th. The engine was now ready to be run. The unit was therefore connected up and when operated was found to vibrate considerably. To demonstrate the cause of this vibration a pin gauge was erected by rigidly fastening a pin near the shaft. By revolving the machine and taking measurements at intervals in the circuit, the distance between the stationary pin and the shaft at different positions was found to vary. This proved that the shaft was out of true. Mitchell, of the Iron Works, accordingly had the shaft taken to a machine shop to be trued up (*128-9).

Pending this operation the Westinghouse representative determined, in the interests of a permanent installation, to substitute a cast-iron sole-plate for the wooden one upon which the generator had been erected. This was accordingly done (*129).

From the foregoing it is plain that the complaint of the Iron Works that the wooden plate caused the vibration, based as it was upon hearsay, was entirely unfounded.

But for another and an independent reason the temporary use of the wooden sole-plate is not material to the question of plaintiff's performance of the contract. It was proved without contradiction that in the case of an engine-type generator of the size involved here the engine-builder furnishes an extended bedplate with the engine to which the generator is subsequently bolted. A bedplate is not a part of the generator. This was established not only by the testimony of the plaintiff's employees but also by that of A. M. Hunt, an engineer of national reputation (*152-3). Upon cross-examination by defendant's attorney, he explained that the issue had been settled in 1901 by a committee appointed by the American Society of Mechanical Engineers. Up to that time there had been frequent misunderstandings upon the subject since the use of direct-connected generators had come into vogue a short time before. The standard was then established that the engine-builder should furnish the joint bedplate, and this practice has been followed generally throughout the country (*155-6). The photographic reproduc-

tion shown above discloses a generator mounted in the customary manner—upon the engine base. Moreover, the contract provides in detail the apparatus which the plaintiff was to furnish, and there is no mention of a bedplate or sole-plate.

When Wernicke, the plaintiff's representative, first saw the defendant's drawings for the installation he noticed that the defendant had not planned an extended base upon which to mount the generator (*157-8). He called the defendant's attention to this in a letter and offered to furnish three plates at $35 each, to be billed independent of the contract (*159-60). In answer to this the defendant wrote criticizing the charge, suggesting the idea of "give and take," and complaining of the provision in the contract for the partial payment (*162-4).

The shaft was returned from the machine shop and Wilson next called to the job on August 25th. In the meantime the metal sole-plate had been installed and the generator erected again. Mitchell and Wilson, assisted by Heber, plaintiff's mechanic, tested the set, measuring the load or development of electrical power by means of a water rheostat. The maximum load was found to be about 50 kilowatts. When that point was reached "the engine laid down." Mitchell then used gasoline instead of gas, but still the engine did no better. The test showed the generator to be in first-class condition. The commutation was perfect and would have been the same under an increased load (*129-31). The output of

the unit should have been 75 kilowatts. It was thus obvious that the Iron Works could not, with the apparatus on hand, develop that amount of power. That the fault lay with the engine was absolutely demonstrated at the trial.

But before proceeding to that subject it is well to note the action of the defendant when it realized its inability to perform the contract with the owner of the building because of the insufficiency of its engine.

Upon the very day of the test it repudiated the contract with the plaintiff, seeking to throw the blame upon the Westinghouse Company. A letter dated August 25 (*139-41) was written to the plaintiff at its San Francisco office, signed by the sales-manager, alleging categorically various items in connection with the installation of the first generator in which plaintiff was said to be in default, and concluding as follows:

> Providing you fulfilled certain conditions which were that you should have your generator installed for our acceptance on July 1st, then we should pay you $1500.00 immediately upon installation and acceptance, which payment will not be made later than July 15th. Another provision in the contract you agree to have both the other units in Portland in ninety days from May 25th. We haven't so much as heard these generators have been shipped from Pittsburgh, a direct violation of your contract with us.
>
> It is true that the coupling between the generator and the engine was 4/1000 inch out of true, an accident liable to occur in the very best regulated factories, and one which could have

been remedied within a couple of days had we been able to find out whether your generator would successfully operate or not; therefore, it is impossible for you to think that we delayed your work in any way.

We beg to notify you that we have not and will not under any circumstances accept your generator nor any other part of your machinery until you have conclusively proved to us that you have done the work specified in your contract with us, which is that you are to supply a generator together with all necessary electrical equipment to deliver 75 KWs in one instance and 100 KWs in another instance to a switchboard when direct connected to our engine, and we further notify you that inasmuch as you have violated your contract with us, the same is void and of no effect.

These efforts to construe the contract are, of course, entitled to no weight. The admission that the engine shaft had been out of true is significant. The repudiation of the contract by the Iron Works is of the highest importance in determining the legal status of the parties.

Upon receipt at the plaintiff's factory of word that the defendant had repudiated the contract, the second and third generators which had been completed and were ready for shipment, were held there. Subsequently they were sold elsewhere (*146).

Having failed to furnish the necessary power, the Iron Works was directed by the owner to remove its apparatus from the Spalding Building (*150-1). F. W. Winn, the superintendent of all the buildings (with one exception) owned by Colonel Spalding in

Portland, testified that the sole cause of directing the Iron Works to remove its machines was the failure of its engine to develop the required horsepower (*151). Shortly thereafter, on the 1st or 2nd of September, Mr. Head, defendant's salesmanager, so notified Wernicke and asked on what terms the plaintiff would release the Iron Works (*159). Thereupon Wernicke telegraphed the plaintiff's factory to hold all shipments (*164).

Mr. Head, testifying for the defendant, stated that on September 6th Colonel Spalding suggested to him that a second generator be obtained and connected up with the defendant's second gas engine, and from the two units sufficient power would be procured. Mr. Head stated further that the plaintiff's second generator was not there, that he could not obtain one from the General Electric Company, and thereupon Colonel Spalding cancelled his contract with the defendant. Mr. Head testified also that he then advised Wernicke that the way the plaintiff "had held off the work" had forced the cancellation and that he desired that the agreement between the parties here should be rescinded. Upon Wernicke's refusal, Mr. Head consulted attorneys and had a letter to the plaintiff prepared by them (*172-3). The body of that letter was as follows:

> You are hereby notified that the Spalding Company has refused to accept the power plant being installed in the Spalding building by us. We had a contract with you to furnish generators to us which would develop a certain capacity and a certain efficiency. The first generator

> furnished by you was not sufficient in any way and, on account of the delay in furnishing the generator by you and the insufficiency of the first generator, we have lost the contract of installing the plant in the Spalding building, all of which we consider to be due to the failure on the part of your company to carry out its contract, and this is to notify you that we shall hold you responsible for all loss and damage to us on account of the loss of this contract (*165).

It but remains to analyze the testimony concerning the relative merits of the gas engine and the generator of which the first unit was composed. The statement of Wilson that the generator showed perfect commutation and operation has already been mentioned (*130-1). The measure of plaintiff's obligation as to the performance of this generator is contained in the contract, and is based upon the approximate efficiency and temperature of the machine (*39). The sole function of a generator is to convert mechanical energy applied to it into electrical power. The quality of a generator thus depends on the amount of energy which is lost during its operation by friction and in heat—the less the loss the better the generator. The ability of the machine to deliver in electrical form the energy applied to it is called its efficiency. The test-sheet of the generator was produced, and two engineers testified that it showed that the machine's performance was better than the contract provided as to both efficiency and temperature (*148-50).

Moreover, in explanation of the fact that upon the test of the unit the rated capacity of the generator

was not delivered, it was conclusively shown that the fault lay with the defendant's gas engine.

The scientific equation between mechanical and electrical energy is: 1 kilowatt = 1-1/3 horsepower. It follows that 75 KW. = 100 HP. This means that if 100 HP. of mechanical energy is applied to a generator of perfect efficiency 75 KW. in electrical energy will be produced. Of course, no electrical machine is perfectly efficient. Thus in order to develop 75 KW. there must be additional mechanical energy to take care of the heat and friction losses. In practice approximately 110 HP. must be developed by a gas engine in order properly to drive the first generator involved here (see testimony of A. M. Hunt, *153).

Subsequent to the fiasco in the Spalding Building Mr. Mitchell, the defendant's representative, procured a test to be made of the gas engine which was a part of the first unit installed. The test was made September 10, 1910, by B. C. Ball, a mechanical engineer of Portland, in the presence of Mitchell and two other mechanics, all of whom corroborated Ball's measurements and observations. *The maximum horsepower developed by the engine was 78.5.* Mr. Ball himself testified for the plaintiff concerning this test, and his report to the Iron Works was introduced in evidence. He stated further that Mitchell remarked at the time that he knew the engine could not develop the amount of power required (*141-5). Thus by defendant's own action it was

conclusively established that the failure of the first unit was the fault of its gas engine.

The foregoing statement of facts does not reflect a partisan view of the record. It is a fair presentation of the uncontradicted evidence by which the jury were necessarily bound in their deliberations and decision. The source of the statement lies indiscriminately in the testimony offered by both parties. And it is particularly significant that not only is the evidence concerning the installation at Portland confirmed in many respects by defendant's conduct and correspondence, but the defendant did not seek to question the accuracy of the narrative, although its representative, Mitchell, was in court and available.

In view of the facts analyzed above, it is plain that the plaintiff lived up to its duty under the contract at all times until defendant's conduct—both by breach and repudiation—relieved the plaintiff from any further obligation to perform. The evidence shows a scrupulous effort on the part of plaintiff at all times to fulfill its obligations under the agreement notwithstanding it was beset at every turn by obstacles for which it was in no way responsible. These more than trebled the expense which should properly have been incurred in the installation but plaintiff made no complaint on that score. It held steadfast to its purpose undeterred by the difficulties in its way due to the delay of others, the faulty apparatus furnished by the defendant, and the latter's ignorance of the requirements of the job which was an admitted experiment (*177). The

plaintiff's representatives were plainly actuated by a zealous desire that a thoroughly satisfactory job should be accomplished. One would have thought that the plaintiff's contract price and not the defendant's depended upon the success of the installation —that the plaintiff instead of the defendant was to derive therefrom the enormous profit involved (*170). On the other hand, when the plaintiff long after its maturity asked for the partial payment to which it was entitled, it was met by complaints and criticism so clearly unfounded in fact and made in such evident bad faith that it would have been justified morally and legally in refusing to go on. Instead, the plaintiff persisted in its work until the first unit was installed and operated and it became plain that due to the insufficiency of its gas-engine the defendant must fail.

Therefore, in reading this record on writ of error one would confidently expect to find in explanation of the verdict for the defendant a palpable misapplication of the evidence or a radical misdirection of the jury. The ground upon which the plaintiff relies for a reversal of the judgment does not require this Court to hold that the jury had no alternative but to find that the defendant was at fault and the plaintiff was not. But the certainty with which the evidence points to that conclusion is of importance in disclosing the extreme prejudice which the plaintiff suffered by reason of the erroneous position taken by the trial judge in charging the jury upon the question of damages. This is the

principal contention which will be argued in this brief.

---

2. The Instructions of the Trial Court upon the Plaintiff's Measure of Damages were Prejudicially Erroneous.

The contract between the parties involved the delivery of three generators. The first was installed in the Spalding Building. The other two were not delivered but were sold elsewhere after the defendant repudiated the contract. Concerning the first generator the jury were charged:

> On the question of damages, should you find for the plaintiff you will understand that under the contract between the parties there was no sale of any part of the machinery therein referred to actually consummated. By the express provisions of the contract no property in or title to the apparatus or any part thereof and no right to use the same under the patents of the plaintiff, passed to the defendant, but all of said apparatus remained the personal property of the plaintiff until fully paid for. The contract in that regard provides that if default be made by the purchaser in payments stipulated for at the time specified in the contract, the seller shall be entitled to the immediate possession of said apparatus and be free to enter upon the premises where the same is located and to remove it as its property. If, therefore, you find for the plaintiff, it will not be entitled to recover for the value of the apparatus installed by plaintiff or any part thereof, since it remains its property, and there is no evidence that it has been lost or injured, but it will only be entitled to recover such damages as it has sustained in

> its endeavor to carry out the contract, such as the expense of the delivery and installation thereof, and the necessary steps to have it returned to it * * * (*184-5).

An instruction upon this subject was requested by the plaintiff and refused as follows:

> The contract provides that the title to the property to be delivered and installed thereunder should remain in the plaintiff until all the payments provided for in the contract were made. But so far as this case is concerned, the insertion of this provision in the contract gave the defendant no more or greater rights than if it had been omitted and should, therefore, be wholly disregarded by you in rendering your verdict (*193-4).

Upon the subject of the second and third generators, the court charged:

> Further, in this connection, it is in evidence that the two generators that were not shipped were subsequently sold by plaintiff. As to those machines, therefore, if you find that they were sold for as much as plaintiff would have realized for them under the contract, the plaintiff can be allowed nothing for the failure of defendant to accept them (*186).

The court refused to give the following instructions requested by the plaintiff:

> If for the reasons I have outlined as the basis therefor, you shall conclude that the plaintiff is entitled to your verdict, the measure of damages is as follows:
>
> The contract price for the entire installation is $7850.00. From this you shall subtract the sum of the following items:

1. The market value at Portland, Oregon, in September, 1910, of the second and third generators if you find that they had such market value.

2. If you find that the permanent switchboard had no market value as such, but only as comprising articles which when dismantled could be replaced in stock, the value of the component parts of the switchboard at said time;

3. The freight charge at said time upon the switchboard from East Pittsburgh, Pennsylvania, to Portland, Oregon, had it been shipped; and

4. The cost at that time of labor and material necessary to erect and install said second and third generators, permanent switchboard and other apparatus.

The balance is the amount of damages suffered by the plaintiff. Whether or not plaintiff received more than the cost of building the second and third generators at a sale to another party is utterly immaterial (*192-3).

The issue is thus squarely presented. Under the instructions of the court it was entirely competent for the jury to conclude that the plaintiff had failed to prove any damages. In fact the jury were told that as to the generators—constituting the principal factors of the contract—the plaintiff could have no recovery notwithstanding defendant's breach. It is, of course, fundamental that an appellate court can not speculate upon the grounds which underlay the verdict. No one can say in what manner or by what process of reasoning they reached their conclusions. They are necessarily presumed to have followed the

instructions of the trial judge and if they were erroneous, the judgment must be reversed unless it appears beyond all doubt that the error did not and could not have prejudiced the rights of the complaining party.

In the case at bar, the jury may have decided that the plaintiff was entitled to damages only on the basis of the first generator delivered and installed. They were told that the plaintiff could recover nothing on this account. If that instruction was erroneous, its prejudicial effect is plain. Plaintiff, adhering to its conception of the measure of damages, offered no evidence upon the theory stated by the court—such as expense of installation or removal. The same applies equally to the charge concerning the other generators. The court had stated the law to be that the plaintiff could not recover the price nor value of the first generator; this was followed by the direction that if the others were sold for as much as they would have brought under the contract (and there was no evidence that they were not), it followed that "the plaintiff can be allowed nothing for the failure of defendant to accept them." The jury were thus enjoined from giving the plaintiff a verdict upon the principal factors of its case—the verdict for the defendant was under the circumstances the natural result.

Moreover, the defendant had interposed a counterclaim (*30-2). Damages were asked because of the plaintiff's alleged breach of the contract. Detailed proof was made of the loss suffered (*168-70). It

may be that under the instructions as to the measure of damages governing the respective parties, the jury found them both in some degree of fault and, deciding that the scale was evenly balanced, gave the verdict to the defendant.

These considerations disclose the important role played by the charge of the trial judge upon this subject. If it was an open question under the facts whether the plaintiff or defendant was in default, any error in the charge is fatal to the judgment. To the demonstration of that error the following sections of this brief will be devoted.

---

3. The Reservation of Title in Plaintiff did not Restrict it to Repossession of the First Generator upon Defendant's Breach.

The contract provided:

> The property in and title to the apparatus * * * shall not pass from the company until all payments hereunder * * * shall have been fully made in cash, and the apparatus herein specified shall remain the personal property of the company, whatever may be the mode of its attachment to the realty or other property, until fully paid for in cash, and the purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus to the company. If default is made in any of the payments in the manner and form and at the time herein specified the company shall be entitled to the immediate possession of said apparatus and shall be free to enter the premises where such apparatus may

> be located and remove the same as its property (*17).

This is the usual form of sale with reservation of title, generally called a conditional sale. That this provision is one for the benefit of the seller and that upon the purchaser's failure to pay the price, the former may either enforce his right to resume possession or waive it and proceed as in a case of an absolute sale, is clearly and definitely settled in the law. The seller is put to his election; the choice of one remedy is an abandonment of the other. Accordingly, an action upon the contract for the price of the article is held to vest title in the purchaser. There is an unqualified unanimity of authority upon this point. We select as illustrations a few cases from various jurisdictions, including that where the contract was negotiated and that in which it was to be performed.

In *The Parke etc. Co. v. White River etc. Co.,* 101 Cal. 37, the court, in construing a contract of conditional sale, held:

> If the money had been paid as agreed, the title would have passed to defendants, and the money not being paid as agreed, the plaintiff could either recover the property or sue for the purchase price. But the pursuit of one remedy necessarily excluded the other. It was not entitled both to the purchase price and the property, and an action brought to recover the purchase price, as was done in this case, is a ratification of the sale (pp. 40-1).

In *Herring-Hall-Marvin Co. v. Smith,* 72 Pac. 704 (Ore.), the court, speaking through District Judge Wolverton, then a member of the State court, held:

> The common, and perhaps the most natural, remedy of the seller upon default, is to declare the buyer's right under the contract forfeited, and take proceedings to recover the property. But this is not the only remedy. Where a party has agreed to purchase and pay for the property, and has or is entitled to possession until default, the seller may have choice of one of four distinct remedies, among which he may waive a return of the property, treat the contract as executed on his part, and recover from the buyer the agreed price (p. 706).

In *Shepard v. Mills,* 50 N. E. 709 (Ill.), it was held:

> It is said, however, that the contract provided that the title to the heating apparatus should not pass, but should remain in appellees until the contract price should have been fully paid, and that in default of payment appellees had the right reserved by contract to take possession, and remove the apparatus from the building; and the argument is that, as there was default in payment of one-half of the contract price, there was no delivery, the title did not pass, and therefore there could be no recovery except for a breach of the contract properly alleged in a special count. We do not agree to this view of the case. The provision in question was for the benefit of appellees to secure the payment of the purchase money, and they had the clear right to waive it—to treat the title as having passed—and rely on their action at law to recover the balance, if any, due them. * * * This provision of the contract was for the benefit of the appellees alone, and it was waived by bringing

> this action in a form which treated the contract as having been fully performed, and the title of the heating apparatus as having passed to appellant (p. 710).

Again, in *Osborne & Co. v. Walther,* 69 Pac. 953 (Okla.), the court held:

> It is true, by the terms of the notes the title to the machine was not to pass to Walther until the notes were paid, but this was a condition for the benefit of the plaintiff, and might be waived by it. By its election to sue on the notes for the purchase price of the machine, it waived this clause in the notes, and title passed to the defendant (p. 955).

In *Kilmer v. Moneyweight Scale Co.,* 76 N. E. 271 (Ind.), it was held:

> The retention of the legal title by the seller could not prevent his recovery by suit of the agreed price according to the terms of the contract of conditional sale. The right to take back the property was a right reserved by the seller for his own benefit, to be exercised at his option. The buyers had no right to return the goods or to complain of the seller for not taking them back (p. 272).

The idea of election of remedy by the seller in the case of a conditional sale is expressed by the United States Supreme Court in *Van Winkle v. Crowell,* 146 U. S. 42:

> The assertion of that lien treated the property as the property of Belser and Parker, and did so after the notes of December 11, 1885, were taken. It was inconsistent with the existence in the plaintiffs of a title to the property. It treated the sale of the property

to Belser and Parker as unconditional (pp. 50-1).

To quote from decisions elsewhere would serve no purpose other than unduly to extend the length of this brief.

It is plain, therefore, that the trial court should have charged, as requested by the plaintiff, that the reservation of title should be ignored.

The same error was implicit in the instruction given upon this subject. The jury were told that the plaintiff could not recover the value of the apparatus delivered and installed, but only the expense of installation and removal. No evidence had been offered on this theory. Here, then, was a misconception of the legal effect of the clause reserving title. This the plaintiff could waive. The commencement of this action constituted plaintiff's election. Upon such waiver the rule of damages ordinarily controlling in the case of a breach of a contract of sale became applicable. Under the facts here the plaintiff could recover either the reasonable value of what it has delivered and installed, or the contract price with proper deductions on account of those particulars in which the contract remained to be performed at the time of defendant's repudiation. The complaint was framed so as to present both theories. The first count pleaded partial performance of the contract by the plaintiff, readiness and ability to perform completely, and defendant's failure to pay and repudia-

tion. The second count was in *indebitatus assumpsit* for the value of the materials furnished. Proof of the latter was made through the witness Wernicke (*157). The evidence upon the measure of plaintiff's recovery on the contract was complete. Upon this score, also, the trial judge committed error in giving and refusing instructions. This will be treated in the succeeding section.

---

4. The Law Concerning the Plaintiff's Measure of Damages was Incorrectly Presented to the Jury.

The agreement in suit was entire and provided for the payment of a single price for complete performance by the plaintiff. The evidence showed that at the time of the defendant's repudiation the apparatus which had not yet been delivered was complete and ready for shipment. In such a case the vendor is entitled to recover the contract price less the value of the parts undelivered and the expenses of delivery and installation thereof which the repudiation rendered unnecessary to be incurred.

The instructions asked by the plaintiff (*192-3) presented this rule clearly and succinctly. The trial judge conceded the accuracy of the plaintiff's statement of the measure of damages. He presented it to the jury in substance but with one material qualification. He directed them to deduct from the contract price the value of all "the property left on the plaintiff's hands". This, under a previ-

ous instruction, necessarily included the first generator. The charge reads:

> But you will bear in mind that the different pieces of machinery called for by the contract were not being sold piece-meal. The contract fixes a gross sum as the consideration to be paid for all the apparatus to be furnished by plaintiff thereunder, and therefore, should you find for plaintiff, it will be entitled to a verdict only for the difference between that gross sum and the value to it of the property left on its hands, to be arrived at in the way I have indicated, to which should be added the expense it would have been to in installing the apparatus not delivered had the contract been carried out, which expense the contract provides is to be borne by the plaintiff (*186-7).

Thus, the court's view concerning the reservation-of-title clause was again responsible for serious error.

Moreover, the instruction just quoted was preceded by that concerning the effect of the sale by the plaintiff of the second and third generators. The jury were told:

> If you find that they were sold for as much as plaintiff would have realized for them under the contract, the plaintiff can be allowed nothing for the failure of defendant to accept them (*186).

Since the contract was entire, there was no method of determining what the plaintiff could have realized for any part of the apparatus under the contract. Thus in making the fact of the sale of these generators a means of denying the plaintiff any

recovery in that behalf, the instructions became conflicting and hopelessly confusing.

---

5. The Evidence Shows Without Conflict that the Plaintiff Performed the Contract.

Thus far the instructions have been considered upon the theory that it was an open question for the jury whether the plaintiff or defendant was guilty of a breach of contract. The prejudicial effect of the errors above discussed is all the more manifest in the light of the facts of the case from which the only rational conclusion was that the defendant alone was at fault.

The defense presented simple issues: first, the sufficiency of the first generator; second, the time of plaintiff's performance.

As to the first, the testimony has been analyzed earlier in this brief (see pages 14 to 16). No other conclusion was possible but that the generator fulfilled the requirements of the contract and that the failure of the unit was due to the defendant's gas-engine.

Concerning the time of delivery and installation of the first generator, the delays were proved without conflict to have been due to causes for which the plaintiff was not responsible. First were the absence of the shaft, which was being manufactured for the defendant, and the incomplete condition of the basement of the Spalding Building (*125-6).

The next delay was due to the failure of fuel; the gas piping to the engine had been connected (*128-9). This was approximately August first. On the fifteenth the unit was operated. This was complete performance by the plaintiff as to the first generator unless the vibration which immediately developed was due to the fault of the plaintiff. The contention of the Iron Works that the wooden base upon which the generator had been erected was responsible for the vibration, had no more substantial form than as a self-serving declaration in Mr. Head's letter to the plaintiff, confessedly based upon hearsay. The suggestion was doubly refuted: first by the demonstration that the engine shaft was out of true and Mr. Mitchell's admission by conduct in having it corrected (*128-9) and second by the fact that it was no part of the plaintiff's duty to furnish a base. The general engineering practice and the terms of the contract coincide in the proof that the plaintiff sold a generator and not the foundations upon which to mount it (*155-6).

Thus, in so far as the first generator was concerned, the plaintiff had lived up to every requirement of the contract—completing its obligation in that behalf on August fifteenth. The operation of the unit on the twenty-fifth and the subsequent test of the engine but served to confirm the contention of the plaintiff that it was in no respect at fault.

The remaining question was whether the plaintiff was guilty of a breach of contract in failing to deliver the second and third generators within time.

It is elementary that the party to a contract who commits the first breach is responsible to the other for its non-performance.

As Justice Brewer, speaking for the United States Supreme Court, said:

> When a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance.
>
> *Anvil Mining Co. v. Humble,* 153 U. S. 540, 52.

See also

> *National Surety Co. v. Long,* 125 Fed. 887 (C. C. A.).

The doctrine of anticipatory breach is also well settled in the Supreme Court. In *Rochm v. Horst,* 178 U. S. 1, it was held:

> After the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it (Syl.).

Tested by this rule, the repudiation by the defendant by its letter of August 25, 1910, entitled the plaintiff to consider the contract as broken and to desist from further effort to perform. At that

time the plaintiff was clearly not in default. The contract provided for the delivery "from our factory in approximately 90 days from date of receipt of order, with full and complete information" (*3). The proposal was accepted by the Iron Works May 26, 1910 (*89), and the contract was taken by Wernicke to Portland and thence mailed to Pittsburgh (*157). There is no specific testimony of the date of its receipt at the factory, so the court may judicially conclude that the contract arrived there about June 1st. The 90-day period expired August 30, 1910. That time was not of the essence follows necessarily from the latitude permitted by the use of the word "approximately". Long prior to the maturity of this requirement of the contract, and at a time when the plaintiff was acting well within its obligations thereunder, the defendant was guilty of repudiation.

Moreover, the defendant's repudiation dispensed with the necessity of proof by the plaintiff that it was able to complete performance. The sole effect of inability in this respect would be to deprive the plaintiff from recovery of damages in so far as the second and third generators were concerned, but it would not affect the right of the plaintiff to sue for the defendant's breach of the contract and to recover upon the score of the first generator which was delivered, either by way of damages or for its reasonable value.

Gray v. Smith, 83 Fed. 824, 828 (C. C. A. 9th Cir.).

See also

Lowe v. Harwood, 139 Mass. 133.

It follows, therefore, that on August 25th the contract was at an end and the plaintiff's cause of action thereon accrued.

Furthermore, the defendant had been guilty of a substantial breach of the contract by its failure to pay the sum of $1500 on July 15th, 1910. In *Phillips Construction Co. v. Seymour,* 91 U. S. 646, the complaint was criticised by counsel for the defendants because of a defective attempt on the part of plaintiffs to plead readiness and ability to perform, but the Supreme Court held:

> We are inclined to think, that, coupled with the allegation that defendant was in default for non-payment for work actually done, this was sufficient. It is not like a case where a plaintiff has done nothing, but is required to put a defendant in default by offering to perform, or showing a readiness to perform. Plaintiffs here had already performed, and the defendant failed to do its corresponding duty under the contract; and, defendant having defaulted on a payment due, plaintiffs are not required to go on at the hazard of further loss (p. 649).

In *Creswell Co. v. Martindale,* 63 Fed. 84 (C. C. A. 8th Cir.), the court, speaking through Judge Sanborn, held:

> The established rights and remedies for the breach of an agreement are as effectually contracted for as the performance of the acts stipulated. One of the rights of the vendor under this contract was to refuse to perform

> subsequent acts stipulated after the vendees had refused to perform a substantial part of the contract on their part. This right is given by the law for his protection to the party to a contract against whom the first breach has been committed. No sound reason occurs to us why its existence should be made dependent on the good faith or belief of him who first breaks the contract. On the other hand, there are cogent reasons to the contrary (p. 87).
>
> * * * * * *
>
> Our conclusion is that the right of a party to a continuing contract to refuse to make subsequent performance on his part, after the other contracting party has refused, upon full notice and demand, to perform a substantial part of the contract on his part, is not dependent on the good faith of the latter, nor on his belief that he is not violating the contract, but rests solely upon the fact whether or not he has violated or failed to perform a substantial part of the contract that the agreement required him to perform (p. 88).

In *Raabe v. Squier,* 42 N. E. 516 (N. Y.), the plaintiffs had been denied recovery because of their refusal to continue the delivery of materials contracted for. In reversing the judgment the Court of Appeals held:

> It is true that the last batch of material was not delivered until December, but we are told that the delay in delivering was because of the nonpayment of the amount due on former deliveries. The refusing to deliver an installment until a former installment had been paid for was not a breach of the contract on the part of plaintiffs (p. 518).

See also

Hull Coal Co. v. Empire Coal Co., 113 Fed. 256 (C. C. A. 4th Cir.), and

Robson v. Bohn, 7 N. W. 357 (Minn.).

It is unnecessary to determine here whether the failure of the defendant to make the payment which fell due would have entitled the plaintiff to consider the contract at an end. It suffices that under the authorities cited, while the defendant persisted in its breach, the plaintiff was under no duty to "hazard further loss" by continuing performance and whether there was a failure on its part to deliver the second and third generators at the time provided became immaterial.

But the evidence shows nothing to have occurred subsequent to August twenty-fifth which militates in any way against the plaintiff's right of action. Wernicke's recital of his conversation with Head on September second discloses an effort by the defendant to buy its peace. Head did not deny the interview nor the fatal admission against his company which his statement connoted. This was freely made; the stress of the moment when these affairs were in process would naturally shut out all inclination to distort the facts. The conversation serves to confirm the plaintiff's position here.

Mr. Head testified that at a subsequent conversation on September sixth he complained to Wernicke that the delay of the plaintiff was responsible for the loss of the contract with Colonel Spalding, and

asked Wernicke to cancel the agreement in suit, but Wernicke refused. Head's self-serving statement could not, of course, alter the facts nor disturb the legal consequences which had accrued.

Over the plaintiff's objection, Head was permitted to testify to a conversation with Colonel Spalding on the same day at which no representative of the plaintiff was present. Spalding is said to have directed Head to procure another generator to be operated with the defendant's second gas-engine and thus produce from the two units sufficient power to answer his needs.

This was pure hearsay and incompetent.

Young v. Godbe, 15 Wall. 562;
National Association v. Shryock, 73 Fed. 774 (C. C. A. 8th Cir.).

Moreover, the status of the transaction between the parties here had theretofore been definitely fixed. Advised by the defendant's repudiation and subsequent proposal of settlement, the plaintiff had desisted from further effort to perform. The testimony thus admitted was immaterial. It put before the jury the dilemma in which the defendant had fallen, and conveyed the idea that the plaintiff was in some way responsible for it. The prejudicial effect of the ruling is, therefore, plain.

The record contained other evidence which clearly demonstrated that the incident in which Colonel Spalding figured could have no logical force in the controversy. The development of seventy-five

kilowatts would have sufficed to meet the requirements of the building at that time (testimony of Winn, *151). The second gas-engine might have had sufficient capacity to produce the full rating of the generator on hand; if not, the two gas-engines could have been connected up with the generator in the manner described by Mr. Hunt (*156), and the combined horsepower would have been sufficient. Moreover, Mr. Winn, Colonel Spalding's superintendent, testified that the cause of directing the defendant to remove its apparatus from the building was the failure of the first engine to develop enough power and not the absence of the second or third units. Of course, the presence of this testimony in the record did not render harmless the admission of Colonel Spalding's statement. It cannot be conclusively presumed that the jury made the analysis of the evidence necessary to reach the conclusion just demonstrated. The erroneous ruling was, therefore, prejudicial to the rights of the plaintiff.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
March 11, 1916.

David L. Levy,
Walter Shelton,
Campbell, Weaver, Shelton & Levy,
Attorneys for Plaintiff in Error.